

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-218489.4

DATE: April 14, 1986

MATTER OF: Mounts Engineering

DIGEST:

1. The discussions with three architect-engineer (A-E) firms--as to anticipated concepts and the relative utility of alternative methods of approach--required under the Brooks Act, 40 U.S.C. §§ 541-544 (1982), should contribute to making possible a meaningful ranking of the A-E firms. Accordingly, they should occur prior to the selection of the most highly qualified firm. Moreover, they may include questions reasonably related to an evaluation of a firm's qualifications.
2. Evaluator's inquiry as to cost of protester's equipment, made during discussions which preceded the final ranking of architect-engineer firms, has not been shown to have been an inappropriate concern and in any event did not prejudice the protester where (1) agency reports that question was motivated only by personal interest and that the answer was not considered in evaluation, (2) nothing in record indicates otherwise, and (3) there is no showing that the cost of the equipment--as opposed to the cost of personnel--was such that it would be a substantial factor in determining the likely fee.
3. Protest filed more than 10 working days after basis was known is untimely. 4 C.F.R. § 21.2(a)(2) (1985).
4. In procurements conducted under the Brooks Act, 40 U.S.C. §§ 541-544 (1982), the contracting agency is required to consider the location of an architect-engineer firm and its knowledge of the locality of the project--unless application of the criterion would not

035107

leave an appropriate number of qualified firms. Higher evaluation score for location closer to project is reasonable.

5. Protest that the architect-engineer (A-E) firm selected as the most highly qualified A-E firm did not comply with state licensing laws is denied where the statement of work only required the use of a registered surveyor, the awardee proposed to use a registered surveyor, and a state investigation indicated that the awardee hired licensed surveyors.
6. Contracting agency did not act unreasonably when it failed to inform the board evaluating the qualifications of architect-engineer firms of the allegation that one firm had failed to fully comply with a requirement in a prior contract for use of a registered surveyor where the question of licensing is unresolved and pending before the state licensing authority.

Mounts Engineering (Mounts) protests the selection by the Bureau of Mines, Department of the Interior (Interior), of Potomac Engineering and Surveying (Potomac) as the architect-engineer (A-E) firm most qualified to collect mine subsidence data at Kitt No. 1 Mine in Barbour County, West Virginia. The selection of Potomac--and the consequent decision not to terminate the contract (No. S0156015) for the same services previously awarded to Potomac--was made after a reevaluation of qualifications undertaken pursuant to our decision in Mounts Engineering; Department of the Interior--Request for Advance Decision, B-218489, et al., Aug. 16, 1985, 85-2 C.P.D. ¶ 181. We deny Mounts' protest.

Generally, under the selection procedures governing the procurement of A-E services as set forth in the Brooks Act, 40 U.S.C. §§ 541-544 (1982), and in the implementing regulations in the Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 36.600-36.609 (1984), the contracting agency must publicly announce requirements for A-E services. An A-E evaluation board set up by the agency evaluates the A-E performance data and statements of qualifications already on file, as well as those submitted in response to the announcement of the particular project. The board then must conduct "discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative

methods of approach for furnishing the required services." 40 U.S.C. § 543. The firms selected for discussions should include "at least three of the most highly qualified firms." FAR, 48 C.F.R. § 36.602-3(c). Thereafter, the board recommends to the selection official in order of preference no less than three firms deemed most highly qualified.

The selection official then must make the final selection in order of preference of the firms most qualified to perform the required work. Negotiations are held with the firm ranked first. If the agency is unable to agree with that firm as to a fair and reasonable price, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee.

By notice published in the Commerce Business Daily (CBD) of September 11, 1984, Interior announced a requirement for the collection of mine subsidence data--data on ground surface movements caused by underground mining--at Kitt No. 1 Mine in Barbour County, West Virginia. The agency requested interested firms to submit Standard Forms (SF's) 254, "Architect-Engineer and Related Services Questionnaire," by which A-E firms can document their general professional qualifications, and 255, "Architect-Engineer and Related Services Questionnaire for Specific Project," by which A-E firms can supplement the SF 254 with specific information on the firm's qualifications for a particular project. Potomac, Mounts and nine other firms responded to the announcement.

Interior then evaluated qualifications without holding the required discussions with three A-E firms. In the agency's initial evaluation Potomac received the highest point score, 890 points, while Mounts received the second highest score, 880 points. The next highest point score was only 770 points.

Given the closeness of the evaluation of the two firms, contracting officials determined that Potomac and Mounts were "equally preferred" and therefore requested them to submit cost proposals. Mounts thereupon submitted a cost proposal in which it offered to provide the required services at unit prices ranging from 26.7 percent to 100 percent above those offered by Potomac.

Shortly thereafter, the evaluation board was requested to reevaluate the qualifications of Potomac and Mounts in order to select the most preferred firm. Upon reevaluation,

the board gave Potomac's qualifications a score of 930 points and Mounts' qualifications a score of 915 points.

When Interior subsequently selected Potomac as the most preferred firm, Mounts protested first to the agency and then to our Office.

In addition to challenging the failure to conduct discussions and the request for cost proposals prior to selecting the most preferred firm, Mounts alleged that (1) there was no indication that Potomac could meet the requirement set forth in the CBD announcement for "registered surveyor(s)," since the SF's 254 and 255 initially submitted by Potomac, although indicating that the firm employed "Surveyors," did not indicate that its surveyors were "registered"; (2) the persons listed in Potomac's SF 255 as key personnel for this project either lacked surveying experience or were not employed by the firm; (3) Potomac lacked the necessary experience and capacity; and (4) the board failed to give Mounts credit for having a local office near the work site and for its allegedly superior knowledge of the locality of the project.

In response, Interior admitted that it had failed to conduct the required discussions. It also acknowledged that the SF's 254 and 255 submitted by Potomac for purposes of evaluation were "not up-to-date." Accordingly, the agency proposed to (1) obtain updated SF's 254 and 255 from the three firms previously rated most highly qualified; (2) appoint a new evaluation board, comprised of qualified personnel from outside the Bureau of Mines, to conduct discussions with and reevaluate the qualifications of the three firms; and (3) determine, based upon the results of the above, whether to continue the contract with Potomac or to terminate it and make award to another firm.

In our prior decision, we concluded that the failure to conduct the required discussions could have prevented a meaningful ranking and could have deprived Mounts of the opportunity for award. We also indicated that the evaluations were open to question on other grounds as well. We pointed out that while SF 255 must be current as of the time of the particular project, Interior had indicated that Potomac's SF's 254 and 255 were "not up-to-date." Moreover, we found Interior's request that firms submit cost proposals

prior to its selecting the most highly qualified firm for negotiations to be improper since the Brooks Act only provided for the consideration of cost during negotiations--i.e., after the final ranking of firms, 40 U.S.C. § 544--and the regulations prohibit the consideration of fees during discussions. FAR, 48 C.F.R. § 36.602-3(c). We therefore sustained Mounts' protest and concluded that there was no reason to question Interior's decision to conduct discussions with the three firms ranked highest in the initial evaluations and to reevaluate their qualifications.

Interior subsequently requested Potomac, Mounts and a third firm--L. Robert Kimball & Associates (Kimball)--to submit updated SF's 254 and 255. A new evaluation board reviewed the updated forms and conducted discussions with the three firms.

Under the evaluation criteria provided to the board, the firms were to be evaluated on the basis of (1) professional qualifications necessary for satisfactory performance (25 percent), (2) "[l]ocation in the general geographical area of the project and knowledge of the locality of the project" (25 percent), (3) specialized experience and technical competence in the type of work required (20 percent), (4) capacity to accomplish work in the required time (15 percent), and (5) past performance (15 percent).

Potomac was found to be the most qualified firm under these criteria, receiving a total of 968 evaluation points. Mounts was ranked second, receiving 951 points, while Kimball was ranked third at 808 points.

Mounts thereupon filed this protest.

Discussions

Mounts questions both the timing and content of the discussions held with the three firms.

Mounts first contends that the evaluation board acted improperly when it held discussions "prior to the re-evaluation."

We disagree. FAR, 48 C.F.R. § 36.602-3(d), provides that the evaluation board shall:

"Prepare a selection report for the agency head or other designated selection authority recommending, in order of preference, at least three firms that are considered to be the most highly qualified to perform the required services. The report shall include a description of the discussions and evaluation conducted by the board to allow the selection authority to review the considerations upon which the recommendations are based."

Since the selection of the most highly qualified firm should take into account the content of the discussions held with the three firms, the discussions must occur prior to the final evaluation of qualifications.1/

As for the content of the discussions, Mounts points out that one of the evaluators inquired as to the cost of the equipment which Mounts proposed to utilize for this project. Mounts suggests that since the cost of its equipment "directly influences" the fee it must charge, this inquiry was improper. In addition, Mounts argues that the evaluation board acted improperly when it questioned the firm about the design of a theoretical subsidence program, since, according to Mounts, that was a subject "completely outside the scope of the required services."

In response, Interior explains that the evaluator inquired about the cost of Mounts' equipment "only to compare [the cost with] what his office had paid for similar equipment"; it denies that the evaluation board considered the cost in the evaluation. The agency maintains that the questions about the design of a theoretical subsidence program were undertaken pursuant to the requirement in FAR, 48 C.F.R. §36.602-3(c), to discuss "concepts and the relative utility of alternative methods of furnishing the required services" and indicates that the answers "revealed much about a firm's qualifications to perform the project."

1/ We note that there was no requirement here for a preliminary evaluation to select the three firms with which discussions would be conducted, since these firms were already selected on the basis of the original evaluations.

Mounts has not demonstrated that the evaluator's inquiry about the cost of certain equipment was an inappropriate concern. In any event, nothing in the record indicates that Mounts suffered any prejudice as a result of the questions and its answers. Mounts has made no showing that the cost of the equipment--as opposed to the cost of its personnel--was such that it would be a substantial factor in determining the fee Mounts was likely to propose. Moreover, nothing in the record indicates that the evaluation board in fact considered the cost of the equipment in evaluating Mounts' qualifications. See also Douglas County Aviation, Inc., et al., B-213205.2, Sept. 27, 1985, 64 Comp. Gen. _____, 85-2 C.P.D. ¶ 345 (protest of evaluation method denied in the absence of prejudice from use of the method).

In addition, we conclude that Mounts has not shown that the questions about the design of a theoretical subsidence program were not reasonably related to a consideration of alternative approaches or to the evaluation of Mounts' professional qualifications.

Location and Knowledge of the Locality

As indicated above, an evaluation criterion for "[l]ocation in the general geographical area of the project and knowledge of the locality of the project" was assigned 25 percent of the total possible evaluation points. Although both Potomac and Mounts had previously worked in northern West Virginia, Potomac maintained an office within 35 miles--or a 1-hour drive--of the project site while Mounts' nearest office was determined by the board to be within 60-65 miles--or a 2-hour drive--of the project. The evaluation board therefore assigned Potomac an average evaluation score of 241.66 points for location and knowledge of the locality, 29 more points than the 212.66 points assigned to Mounts under this criterion.2/

2/ Although Mounts alleged during its prior protest that it maintained an office in Philippi, West Virginia, "only a few miles from the site," the updated SF 254 submitted to the evaluation board indicates that its closest office is in Washington, Pennsylvania, approximately 60 miles from Barbour County, West Virginia, where the project site is located.

Mounts, however, objects to the consideration of geographical location, maintaining that both firms are located in the same general geographical area. In a December 23 submission to our Office, Mounts pointed out that the chairman of the evaluation board stated in his report of the evaluation results--a report which Mounts included in its submission--that since all three firms were located within 100 miles of the project site, location should not have been an evaluation factor. The chairman indicated that Mounts was the most qualified firm if location was not considered.

In a subsequent submission to our Office filed on January 31, Mounts pointed out that the chairman had also stated in the report to the contracting officer that if location was to be considered, then assigning 25 percent of the possible evaluation points to the criterion was excessive. Mounts therefore argued that if location was a proper criterion, it was "certainly weighted too heavily."

We initially point out that our Bid Protest Regulations, 4 C.F.R. pt. 21 (1985), require that protests--other than those based upon alleged improprieties in a solicitation--be filed within 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Since Mounts knew at least as early as its December 23 submission that Interior had assigned 25 percent of the possible evaluation points to the criterion for location, but did not protest the weight accorded this criterion until its submission filed on January 31, more than 10 working days later, its protest in this regard is untimely.

Moreover, we note that FAR, 48 C.F.R. § 36.602-1(a)(5), provides for the consideration of geographical location and knowledge of the locality, except where the application of this criterion would not leave an appropriate number of qualified firms. Mounts does not challenge the adequacy of the competition remaining after application of this criterion, and we have no independent basis to question the agency's decision to consider geographical location. Cf. Bartow Group, B-217155, Mar. 18, 1985, 85-1 C.P.D. ¶ 320 (requirement for an office within 30 miles of project). Nevertheless, since Mounts bases its argument on the conclusion that Potomac and Mounts were essentially equal in regard to location, we consider it to be challenging the application of the criterion as well as its propriety.

Our review of an agency selection of an A-E contractor is limited to examining whether that selection is reasonable. We will question the agency's judgment only if it is shown to be arbitrary. Moreover, the protester bears the burden of affirmatively proving its case. Y.T. Huang & Assocs., Inc., B-217122, B-217126, Feb. 21, 1985, 85-1 C.P.D. ¶ 220.

Although the chairman of the evaluation board assigned the same point score to both Potomac and Mounts under the criterion for location, the remaining two members of the board assigned a higher point score to Potomac as a result of its office being located 30-35 miles closer to the project site. Since evaluating proposals involves subjective as well as objective judgments, it is not unusual for individual evaluators to reach disparate conclusions. Digital Radio Corp., B-216441, May 10, 1985, 85-1 C.P.D. ¶ 526; Western Engineering and Sales Co.; B-205464, Sept. 27, 1982, 82-2 C.P.D. ¶ 277. The average scores here for the location criterion, and therefore the total evaluation scores, reflected the conclusion of two of the three evaluators that Potomac's location 30-35 miles closer to the project site justified a higher score under the location criterion. Mounts has failed to demonstrate that the overall judgment of the evaluation board in this regard lacked a reasonable basis.

Professional Qualifications

The CBD notice stated that the project "requires a registered surveyor(s) to conduct the survey," while the Statement of Work indicated that "registered surveyor(s) and crew(s) shall conduct the survey(s)." In the SF 255 it submitted in response to Interior's request for updated SF's 254 and 255, Potomac listed 6 "Surveyors" as currently employed by the firm and provided a brief resume for one land surveyor--registered in West Virginia, Maryland and Ohio--whose services it anticipated utilizing for the project.

Mounts, however, points out that by letter of June 5, 1985, the State Board of Examiners of Land Surveyors in West Virginia--the state where Kitt No. 1 Mine is located and where Potomac maintains an office--notified Potomac that the Board of Examiners had received a complaint filed by Mounts and that it appeared that Potomac was "not in full

compliance" with West Virginia law "since . . . [the owner of Potomac] is not a licensed land surveyor." When Potomac allegedly failed to respond to this letter, the Board of Examiners, by letter of August 26, informed the firm that "in view of the information provided by Mounts Engineering regarding your surveying/activities, you are requested to cease and desist such practice in the State of West Virginia."

A contracting agency may require an offeror to comply with a specific known state or local licensing requirement as a prerequisite to award. See Olson and Assocs. Engineering, Inc., B-215742, July 30, 1984, 84-2 C.P.D. ¶ 129. It need not, however, impose such a requirement, and if it does not then the contracting officer generally need not concern himself with state or local licensing requirements. See North Park Village Homes, Inc., B-216862, Jan. 31, 1985, 85-1 C.P.D. ¶ 129; Olson, B-215742, supra, 84-2 C.P.D. ¶ 129 at 2.

The statement of work here did not require the proposed contractor itself to possess a license as a prerequisite to award. Rather, it merely required that the contractor use a registered surveyor and crew to conduct the survey; a requirement which Potomac proposed to meet through utilization of the services of a registered land surveyor. Cf. Mounts Engineering, B-218102.3, May 31, 1985, 85-1 C.P.D. ¶ 622, aff'd, Mounts Engineering--Reconsideration, B-218102.4, July 24, 1985, 85-2 C.P.D. ¶ 77 (offeror took no exception to requirement for registered surveyor).

In any case, we note that the West Virginia Board of Examiners on October 8 requested the Attorney General of West Virginia to clarify the relevant state law, noting that Potomac is a "sole proprietorship" which "hires persons licensed and/or registered in both the Engineering and Surveying fields to certify the work or services provided." Further, we also note that the contracting officer indicates that he will take "[a]ppropriate action" once the Attorney General clarifies state law. See Lewis & Michael, Inc.; Stark Van Lines of Columbus, Inc.--Reconsideration, B-215134.2, B-215134.3, June 26, 1984, 84-1 C.P.D. ¶ 673 (if contractor is not in compliance with state or local law and, as a result of enforcement action by the state or locality, chooses not to perform the contract or is prohibited from doing so, the contract may be terminated for default).

In these circumstances, the August 26 cease and desist order did not render the subsequent selection of Potomac unreasonable. Cf. Metropolitan Ambulance Service, Inc., B-213943, Jan. 9, 1984, 84-1 C.P.D. ¶ 61 (where a contracting officer determines that enforcement attempts by state or local authorities are likely and that there is a reasonable possibility that such action may delay performance by an unlicensed contractor, he may find the contractor nonresponsible under a solicitation's general licensing requirement).

Prior Performance

Potomac listed its current work under a contract for a mine subsidence survey--the Blacksville project in Pennsylvania and West Virginia--in the sections of its updated SF's 254 and 255 in which offerors are asked to provide examples of projects undertaken in the past 5 years (SF 254) and projects best illustrating the firm's current qualifications for providing the required services (SF 255).3/

Mounts, however, alleges that the evaluation board was not informed by Interior of certain allegations concerning Potomac's compliance with the requirement in the Blacksville contract for use of a registered surveyor. In particular, Mounts refers to a September 6, 1985, letter from the Bureau of Mines in which the agency informed Potomac that it had received information that the land surveyor whom the firm indicated was supervising the Blacksville project in fact "never certified nor sealed any plans, documents or reports relative to this project." Interior therefore requested Potomac to furnish the agency with "evidence of the actual individual providing these services" so as to assure the agency of "full compliance" with the requirements of the contract.

3/ Although Potomac in fact described the Bureau of Mines project in question in its SF's 254 and 255 as "Mine Subsidence Survey, Blacksville, WV [West Virginia]," with an estimated cost of \$110,000, we understand the reference to be to contract No. S0156011, awarded to Potomac by the Bureau of Mines for a \$110,000 mine subsidence survey at "Blacksville No. 2 Mine" in Greene County, Pennsylvania. We have been informally advised by Potomac that it has received only one contract for a Blacksville mine subsidence survey, but that the project in fact extends over two states, West Virginia and Pennsylvania.

Interior informs us that the "licensing matter is in question pending further information from the state Board of Professional Engineers" and Mounts reports that state licensing proceedings regarding Potomac's practice in Pennsylvania are pending in that state. Interior therefore argues that since the matter is still "unresolved," it was not for consideration by the evaluation board.

We note that the evaluation board was provided with the updated SF's 254 and 255 by letter of October 25, 1985, and that the chairman of the board reported the evaluation results by letter of November 15. Since Interior viewed the licensing concerns as "unresolved," we do not consider that it was unreasonable for the agency to refrain from reporting these concerns to the evaluation board. Cf. NJCT Corp., B-219434, Sept. 26, 1985, 64 Comp. Gen. ____, 85-2 C.P.D. ¶ 342 (protester failed to demonstrate that agency lacked a reasonable basis for characterization of potential contractor's performance on other contracts).

The protest is denied.

Harry R. Van Cleve

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